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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARINA HALL,

Plaintiff and Appellant,

v.

UNIVERSITY OF SOUTHERN
CALIFORNIA,

Defendant and Respondent.

B174502

(Los Angeles County
Super. Ct. No. BC304138)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Susan Bryant-Deason, Judge. Affirmed.

E. Lyn Lemaire for Plaintiff and Defendant.

Paul, Hastings, Janofsky & Walker, J. Al Latham, Jr., Christina L. McEnerney for
Defendant and Respondent.

A university student was dismissed from a graduate program for violating school rules. The student filed a lawsuit against the university in 2001, claiming that the expulsion was unjustified. The 2001 lawsuit was resolved by summary judgment, when

the trial court found that the student's exclusive remedy is administrative mandamus. After the case was dismissed, the student filed a new lawsuit in 2003 seeking to recover damages for the same alleged violation of her rights. The 2003 lawsuit was dismissed because (1) it is barred by res judicata, and (2) the student's exclusive remedy is administrative mandamus. We affirm the judgment and the court's imposition of sanctions. In addition, we impose sanctions of our own on appellant's counsel for prosecuting this unmeritorious and frivolous appeal.

FACTS

"Hall I": The 2001 Lawsuit

In August 2001, Marina Hall filed suit against the University of Southern California (USC) after being expelled from USC's graduate program in film production. In *Hall I*, Hall alleged that she was one of only 25 students admitted into the program in 1999. In early 2000, Hall and her classmates were given a project in which they pretended to produce a film based on an actual script, entitled "Love and Honor," by an Oscar-winning screenwriter. In April 2000, USC discovered that Hall had discussed "Love and Honor" outside of the class with people who were interested in financing the project and an actress who wanted to perform in the film. Discussing the screenplay with people outside of the class violated the program's written "Standards of Student Conduct."

Hall was questioned by administrators in USC's film production program regarding her conduct in connection with "Love and Honor." The administrators recommended that Hall be dismissed from the program in May 2000. USC then dismissed Hall, in alleged violation of her rights under the USC Student Code, by failing to provide her with written notice; by not allowing her to review evidence or present witnesses; by using an improper standard of proof; and by relying on vague and overbroad conduct provisions.

In *Hall I*, Hall asserted claims for breach of contract; breach of the implied covenant of good faith and fair dealing; defamation; conspiracy; declaratory relief; and unfair competition. *Hall I* was resolved in January 2003, on a motion for summary

judgment. The trial court found that Hall's exclusive remedy is a petition for a writ of administrative mandamus to review procedural or substantive defects in USC's grievance procedures. Hall cannot maintain an action for damages against USC, the court concluded, until she succeeds in setting aside her expulsion in a writ proceeding. No appeal was taken from the judgment in *Hall 1*.

"Hall 2": The 2003 Lawsuit

Hall's reaction to the judgment in *Hall 1* was to file a new tort suit against USC in October 2003. In *Hall 2*, Hall alleges that she was expelled from USC "without cause." This, she claims, is part of a plan crafted by USC in 1996, "to terminate tenured professors, graduate students, and others" According to Hall, USC's goal is to use the terminations "to control and intimidate faculty and students"

As in *Hall 1*, Hall alleges that she was admitted into USC's film production program in 1999. She paid a sizeable tuition fee for her first year of schooling, with the hope of making important contacts with luminaries in the film industry. Hall was assigned the project on "Love and Honor," and shared her enthusiasm about the script with housemates. Hall "believed she could find people who might want to invest in the project." The course instructor appreciated Hall's enthusiasm; however, Hall was terminated from the program in 2000 for violating USC's standards of student conduct, which expressly forbid sharing course materials with others, on pain of dismissal.¹ Hall contends that the specified causes for dismissal from the program are vague and ambiguous. She also contends that she did not violate school rules.

¹ The standards of student conduct provide that "**Things said in confidence must not be repeated outside the classroom. Material distributed in the classroom may not be duplicated or passed on to others outside The Program. Needless to say, sharing any information with tabloids or their like, or with others who may do so, is completely & expressly forbidden. [¶] VIOLATION OF THESE STANDARDS IS CAUSE FOR DISMISSAL.**"

Hall 2 natters on for pages about various tenured professors who were purportedly targeted for termination by USC. None of the instances cited by Hall relate to Hall's own dereliction. Without belaboring the matter, suffice it to say that *Hall 2* alleges an all-encompassing conspiracy at USC to amend its rules to include more due process language and then to systematically subvert those rights, at least as to tenured professors.

In her first cause of action for fraud, Hall asserts that USC promised to act fairly, in accordance with principles of due process, as provided in USC's written guidebooks and in verbal representations. The contractual relationship between the parties incorporated this promise of due process, which included assurances that USC (a) would not interpret reasonable behavior as misconduct; (b) would apply fair and rational standards of conduct; (c) would not interpret the standards of conduct in an arbitrary or capricious manner; (d) would not initiate proceedings without notice; (e) would use a fair and impartial review process; and (f) would not impose sanctions disproportionate to the offense.

Hall alleges that USC had no intention of performing these promises. Instead, USC planned to arbitrarily and unfairly terminate its contractual relationships without good cause, using its own employees to carry out the proceedings leading up to a dismissal. These internal procedures are used to disguise the lack of good cause and create the appearance of a valid adjudication. Hall would not have enrolled in the USC film program, or paid tuition, had she known that USC had admitted her with the intent to terminate her from the program.

In her second cause of action for a constitutional tort, Hall attacks the outcome in *Hall 1*, claiming that the ruling "effectively left Plaintiff with no meaningful remedy for her tort causes of action" and no way to recover punitive damages. She alleges a property and liberty interest in remaining enrolled in USC's film program, so she can pursue a career in film production. The claim is, at base, for deprivation of her due process rights--the alleged irrationality of the decision to expel Hall and the lack of attendant procedural safeguards.

USC demurred to *Hall 2*, arguing that the dispute was settled under principles of res judicata; that administrative mandamus is Hall's exclusive remedy; that Hall's fraud claim is untimely; and that Hall's claim of a constitutional tort either does not exist or cannot be asserted against a private entity. USC requested the imposition of sanctions.

At the hearing on the demurrer, Hall argued that administrative mandamus is not a meaningful remedy, and that *Hall 2* alleges new causes of action so res judicata does not apply. The trial court disagreed with Hall's arguments, finding that the new claims are (1) barred by res judicata; and (2) not viable in any event because Hall's exclusive remedy is a petition for a writ of mandamus. The court observed that Hall's fraud claim is untimely, and that there is no constitutional cause of action to remedy an asserted violation of due process rights.

The court sustained USC's demurrers without leave to amend and dismissed *Hall 2*, with prejudice. The court imposed on Hall's attorney, E. Lyn Lemaire, sanctions of \$11,250, of which \$6,250 were payable to USC and \$5,000 to the court. Appeal is taken from the judgment of dismissal and the imposition of sanctions.

DISCUSSION

1. Appeal and Review

A judgment entered after demurrers are sustained without leave to amend is an appealable order. (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 266.) The ruling on the demurrer is reviewed de novo, exercising our independent judgment to determine whether the complaint states a cause of action, as a matter of law. (*Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667; *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) The order imposing attorney sanctions in excess of \$5,000 is also appealable. (Code Civ. Proc., § 904.1, subd. (a)(12).) "We review the imposition of monetary sanctions for a prejudicial abuse of discretion." (*20th Century Ins. Co. v. Choong* (2000) 79 Cal.App.4th 1274, 1277.)

2. The Order Sustaining Demurrers Without Leave to Amend

The legal relationship between a student and a private university is a contractual one, and the university's catalogues, bulletins, circulars and regulations are all part of the

contract. (*Paulsen v. Golden Gate University* (1979) 25 Cal.3d 803, 811; *Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 10.) In *Hall I* and in the present case, Hall has launched two attacks on the legitimacy of USC's dismissal procedures, as provided for in the school's written guidebooks and student conduct regulations.

Administrative mandamus is the exclusive remedy for those who feel wronged by procedural defects in a university's dismissal procedures. "Mandamus is available if a hearing is required by statute, an organization's internal rules and regulations, or due process." (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1727, fn. 10. (*Pomona*)). Thus, if the parties' relationship is governed by a college handbook or regulations, and the regulations require a hearing, then the hearing is one required by law. (*Ibid.*)

Teachers and students "cannot circumvent administrative mandamus review by seeking redress for alleged procedural and due process deficiencies in the dismissal process. That is precisely the purpose of mandamus review--to ferret out such flaws and rectify them." (*Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 978 (*Gutkin*)). Mandamus addresses the fairness of a school's processes; i.e., whether the school "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Pomona, supra*, 45 Cal.App.4th at pp. 1729-1730.) Both *Gutkin* and *Pomona* were decided by this Court.

The recent case of *Gupta v. Stanford Univ.* (2004) 124 Cal.App.4th 407 is compelling. Gupta, a student at Stanford, was suspended for violating the school's honor code. He participated in a hearing conducted by a Stanford judicial panel before punishment was imposed. Gupta then instituted a lawsuit for damages, asserting claims for breach of contract, misrepresentation, fraud and emotional distress. (*Id.* at pp. 409-410.) The trial court sustained demurrers, finding that Gupta's remedy was a petition for a writ of mandate. (*Id.* at p. 411.) The Court of Appeal, following *Gutkin*, agreed that administrative mandamus applies to a student who is subject to university disciplinary

proceedings. “Regardless of Gupta’s characterization of the causes of action in tort or contract, he cannot avoid the fact that the gravamen of his claims is confined to the disciplinary process and the proceedings against him. As such, Gupta was required to pursue his claims through writ of mandate, and his failure to do so supports the court’s order sustaining the demurrer.” (124 Cal.App.4th at p. 412.)

In her first cause of action for fraud, Hall alleges that USC violated the principles of due process articulated in its guidebooks and regulations by failing to apply fair and rational standards, misinterpreting its standards, proceeding without proper notice, following an unfair review process, and applying a disproportionate punishment. Likewise, Hall’s second cause of action claims a deprivation of her due process rights.² All of Hall’s claims--both in *Hall 1* and here--fall within the scope of mandamus. (See *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1424-1426 (*Pollock*) [a claim of institutional fraud in the dismissal process at USC is subject to the remedy of mandamus].) Accordingly, the trial court properly sustained USC’s demurrers without leave to amend, because Hall’s exclusive remedy is a petition for a writ of mandamus.

The court also properly sustained the demurrers because this lawsuit is nothing more than a duplication of *Hall 1*. *Hall 1* was resolved on the merits, with a motion for summary judgment and a finding that administrative mandamus is Hall’s exclusive remedy. No appeal was taken from the judgment in *Hall 1* and it is now final. As before, Hall’s new complaint attacks the legitimacy of her dismissal from USC’s graduate film program, claiming that USC used improper or inadequate methods to dismiss students. The primary right that Hall seeks to vindicate here is the same primary right that was

² The second cause of action fails in any event because (a) there is no constitutional tort cause of action to redress alleged due process violations (*City of Simi Valley v. Superior Court* (2003) 111 Cal.App.4th 1077, 1084); and (b) even if there were a constitutional tort it could only be asserted against a government entity, not against a private institution like USC.

already litigated in *Hall 1*. The complaints in both actions allege the same facts and attack the fairness of USC's procedures. Hall cannot avoid the res judicata effect of the prior litigation by devising a new legal theory to seek vindication of the same primary right. (*Pollack, supra*, 112 Cal.App.4th at p. 1427.)

3. The Imposition of Sanctions by the Trial Court

USC requested the imposition of sanctions pursuant to Code of Civil Procedure section 128.7 (section 128.7). Section 128.7 provides that any pleading filed with the court and signed by an attorney of record implicitly certifies that it is not presented for an improper purpose such as harassment, delay, or to incur needless litigation costs; that the claims are warranted by existing law or by a nonfrivolous argument to extend, modify or reverse existing law; and that the allegations have evidentiary support. (§ 128.7, subd. (b).) If, after notice and a reasonable opportunity to respond, the court determines that these conditions have been violated, the court may sanction the lawyer. (§ 128.7, subd. (c).) Sanctions are "limited to what is sufficient to deter repetition" of the bad conduct and may include some or all of the reasonable attorney fees and expenses incurred as a result of the violation, as well as a penalty payable to the court. (§ 128.7, subd. (d).)

On appeal, Lemaire attacks the basis for the sanctions order but does not challenge the reasonableness of the dollar amount that she was assessed. She argues that the trial court "was evidently confused" about her nonparticipation in *Hall 1* and the allegations contained in that litigation. The reporter's transcript indicates that the court understood perfectly that Hall was represented by a different attorney in *Hall 1*. During the hearing on the demurrer, Lemaire, informed the court that she did not represent Hall in the prior litigation. The court replied, "Well, I don't care," and pointed out that there was nothing confusing about the order in *Hall 1* granting summary judgment on seven causes of action.

The court was correct: principles of res judicata are not suspended merely because a party who loses a case on the merits hires a different lawyer to file a new lawsuit in an attempt to relitigate the same primary right. It was patently unreasonable for Lemaire to file *Hall 2*, which is simply a rehash of *Hall 1*, after a final judgment was entered in

Hall 1 on the grounds that Hall's exclusive remedy stemming from her dismissal from USC is a petition for administrative mandamus. Lemaire's apparent antipathy toward established California legal procedure and precedent is not a valid basis for filing a new lawsuit for damages based on the same set of facts, instead of filing a petition for mandamus. It is no excuse that Lemaire feels that she "is merely advocating for a just result." Contrary to what Ms. Lemaire might think, filing a second tort suit is not zealous representation of a client, nor does it demonstrate unusual optimism, commitment to preserving academic freedom, or faith in the justice system. It is simply a display of poor judgment and an utter lack of regard for prior rulings and judicial precedent.

Ms. Lemaire has been harshly sanctioned for engaging in the same type of conduct elsewhere. Division Three of this District sanctioned Lemaire and her client \$14,000 for filing a second lawsuit against USC after a nearly identical prior suit was dismissed because the client's exclusive remedy was administrative mandamus; Lemaire was additionally ordered to pay the court \$3,000 for filing a frivolous appeal. (*Pollack, supra*, 112 Cal.App.4th at pp. 1431-1434.) Evidently, the sanctions imposed by Division Three in October 2003 had little effect: during that same month, Lemaire filed *Hall 2*, demonstrating a continuing indifference toward preserving judicial resources.

Under the circumstances, we cannot say that the imposition of sanctions was an abuse of discretion. Lemaire knew that this District requires the filing of a petition for mandamus, not a lawsuit for tort damages: she participated in both the *Gutkin* and the *Pollack* appeals, and cannot claim ignorance of the law. The arguments that Lemaire made urging the trial court to ignore *Pomona*, *Pollack* and *Gutkin* were unwarranted, and it may be inferred that the only reason she has continued to file these tort actions against USC--instead of a writ petition, as she has been repeatedly instructed--is to harass the university or cause it to needlessly incur litigation costs.

We do not address the amount the trial court assessed against Lemaire because she has not challenged the reasonableness of the amount awarded. Lemaire also did not question the propriety of the procedures leading up to the imposition of sanctions. Arguments not raised in the trial court or in appellant's opening brief are deemed

abandoned or waived. (*LeFlore v. Grass Harp Productions, Inc.* (1997) 57 Cal.App.4th 824, 838, fn. 15; *Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1.)

4. Imposition of Sanctions on Appeal

USC has requested the imposition of sanctions to punish Hall and Lemaire for filing a frivolous appeal, seeking \$16,675 payable to USC and \$25,000 payable to the Court of Appeal. We issued an order to show cause and invited opposition to the motion for sanctions. (Cal. Rules of Court, rule 27(e).) Appellant and Lemaire argue that this appeal is not frivolous because principles of res judicata do not bar the filing of *Hall 2*, and *Hall 2* is a justifiable effort to convince this Court to disapprove its holdings in *Pomona* and *Gutkin*, which appellant and Lemaire believe are unsound decisions.³

An appeal is sanctionable “when it is prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment--or when it indisputably has no merit--when any reasonable attorney would agree that the appeal is totally and completely without merit.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650; Code Civ. Proc., § 128.5, subd. (b)(2).)

Lemaire has been repeatedly instructed in prior appellate opinions that administrative mandamus is the sole remedy available to her clients in cases against universities. (See *Pollack and Gutkin, supra.*) This Court sanctioned Lemaire just recently for the same conduct. (*Gutkin v. University of Southern California (Gutkin 2)* (Dec. 7, 2004, B172403) [nonpub opn.].) Lemaire persists in making the same failed argument to this Court despite repeated holdings that the argument has no merit.

³ Appellant asks us to take judicial notice of two unpublished opinions from this district, *Miller v. University of Southern California* (Mar. 8, 2004, B162952) and *Zernik v. University of Southern California* (Jun. 30, 2004, B159003). While the unpublished cases are not citable, we note in passing that both *Miller* and *Zernik* adhere closely to the holdings in *Pomona* and *Gutkin*, and do not support appellant’s contention that there is “a vibrant legal debate in the courts” regarding the use of administrative mandamus in disciplinary matters at private universities. There are no cases supporting appellant’s theory.

What makes this appeal particularly egregious is that Hall already had a prior “bite at the apple” in *Hall 1*. A judgment was reached in *Hall 1* disposing of Hall’s arguments on the merits. No appeal was taken from *Hall 1*, which became final and binding under principles of res judicata. Blithely ignoring the finality of *Hall 1*, Lemaire instituted *Hall 2* and made further tort claims, even though *Hall 1* limits Hall to her mandamus remedy. This is part and parcel of Lemaire’s repeated pattern of ignoring rules. (See *Papadakis v. Zelis* (1992) 8 Cal.App.4th 1146, 1150 [conduct unrestrained by prior admonitions warrants the imposition of significant sanctions].)

Lemaire’s implacable pursuit of USC is taking on the appearance of a personal vendetta. (See *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1559-1560.) Given the tens of thousands of dollars in sanctions imposed on Lemaire in *Pollack* and *Gutkin 2*, it appears that she is willing to tolerate high risks just to score points against USC. Her obsession, unfathomable as it seems, will not be paid for by her opponent, which is why we award appellate sanctions in the amount of \$16,675 payable to USC by attorney Lemaire. We deny USC’s request for additional sanctions payable to the Court.

DISPOSITION

The judgment (order of dismissal and order imposing sanctions) is affirmed. Attorney Lyn Lemaire is ordered to pay sanctions on appeal to USC in the amount of \$16,675. Appellant will bear all costs on appeal.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.